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No. 03-816

Supreme Court, U.S.
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In The
Supreme Court of the United States

SUWANNEE SWIFTY STORES, INC.,

Petitioner,

v.

GEORGIA LOTTERY CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

I.

Should this Court grant certiorari to review the Circuit Court's disposition of Petitioner's appeal, affirming the District Court's decision which affirmed the decision of the Bankruptcy Court granting summary judgment to Respondent, based on the determination that the funds transferred were not recoverable under 11 U.S.C. § 549 because they were voluntarily transferred and were not property of the bankruptcy estate?

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PART I.

STATEMENT OF THE CASE

Petitioner is a debtor in bankruptcy having filed a Chapter 11 bankruptcy petition in the Bankruptcy Court for the Middle District of Georgia on December 12, 1996. On December 11, 1998, Petitioner filed a Complaint under 11 U.S.C. § 549 seeking to recover post petition transfers that it made to Respondent, the Georgia Lottery Corporation. After the parties filed a stipulation of facts and cross-motions for summary judgment, the Bankruptcy Court for the Middle District of Georgia denied Petitioner's motion and granted the Respondent's motion. The Bankruptcy Court determined that the funds transferred to the Respondent could not be recovered under 11 U.S.C. § 549 because they were held in trust by Petitioner for Respondent and were not property of the bankruptcy estate. Pet. App. C. Petitioner appealed to the District Court for the Middle District of Georgia which affirmed the Bankruptcy Court's decision by also determining, like the Bankruptcy Court, that the funds transferred were held in trust for Respondent and were not property of the estate. Pet. App. B. Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. On April 28, 2003, the Eleventh Circuit affirmed the decision of the District Court without opinion. Pet. App. A. Petitioner sought rehearing and rehearing en banc which the Eleventh Circuit denied. Pet. App. D. Petitioner has submitted a timely petition for a writ of certiorari to this Court.

Petitioner's Complaint against Respondent involved instant Georgia Lottery tickets ("Lottery tickets"). Instant Lottery tickets are paper tickets that are immediately available for play when purchased. They are sold to

customers who then "scratch-off" a substance on the tickets revealing winning numbers or other information.

The Petition sets forth a number of facts. Respondent addresses certain factual statements of Petitioner below. The Opinions of the Bankruptcy Court and the District Court that are included in the Appendix to the Petition set forth the facts relevant to this case. Respondent provides some factual discussion herein to address the facts set forth in the Petition.

Petitioner filed its bankruptcy petition on December 12, 1996. Petitioner's sales of Lottery tickets was an immediate issue. In the Petition, Petitioner implies that it was somehow confused or mislead by a facsimile from an attorney employed by Respondent dated January 30, 1997 which Petitioner characterizes as "shortly following the filing of the Bankruptcy Case." Pet. 6. Petitioner asserts that it relied on the calculations contained in this facsimile in agreeing "that the amounts due during Week I to the GLC for *both* Instant Ticket and On-Line ticket sales were to be prorated as of the close of business on December 11, 1996." Pet. 6. This alleged reliance by Petitioner is simply inconsistent with the findings below.

Petitioner also sets forth a timeline regarding how sales of Lottery tickets were addressed in Petitioner's bankruptcy case. Pet. 8-9. Respondent submits that this timeline omits several relevant events.

Petitioner filed its bankruptcy case on December 12, 1996. As set forth in the Order of the District Court in this case, Petitioner and Respondent agreed to prorate the amount to be paid over to Respondent for the week of December 8-14, 1996 as of the close of business on December 11, 1996. Pet. App. B 7a-8a. On December 18th,

Petitioner wire transferred to Respondent the sum of $86,677.50 leaving a balance due pre-petition of $72,186.74. Pet. App. B 8a. Thus, the arrangement with respect to prorating the amount to be paid over for the week of December 8-14, 1996 was agreed to and paid over to Respondent more than a month before the facsimile of January 30, 1997 to which Petitioner devotes so much discussion.

A number of other events occurred immediately after the filing of the bankruptcy case. On the same day that it filed bankruptcy, Petitioner filed an Emergency Application for Authority to Use Cash Collateral and Grant Replacement Lien which included a request that the Petitioner be permitted to make disbursements to Respondent. Pet. App. B 10a. On December 17, 1996, the Bankruptcy Court entered an Order authorizing weekly disbursements for the first four weeks of the case to the lotteries of Georgia and Florida not to exceed $215,000 per week. Pet. App. B 10a; Pet. App. C 25a. Thus, five days into the case, Petitioner had obtained authority by way of Court Order to make disbursements to Respondent. On December 19, 1996, Petitioner filed an Emergency Motion to Assume Executory Agreement with Respondent wherein it sought to pay over to Respondent the $72,186.74 which had not been paid as the result of prorating the week of December 8-14, 1996. Pet. App. B 10a. After a preliminary hearing on this Motion, the Bankruptcy Court found that the amount owed Respondent as of the petition date was 'approximately $73,000 for pre-petition lottery sales' and authorized Petitioner to continue selling Lottery tickets under its agreement with Respondent. Pet. App. B 10a; Pet. App. C 25a-26a. On January 6, 1997, the Bankruptcy Court entered another Order authorizing continued use of

cash collateral which authorized weekly disbursements to the Georgia and Florida Lotteries through January 23, 1997 in amounts averaging $212,000 per week. Pet. App. B 10a n. 4; Pet. App. C 25a.

On February 13, 1997, the Bankruptcy Court held a formal hearing on Petitioner's Motion to Assume its Contract with Respondent. Pet. App. B 10a. At this hearing, Petitioner, through its counsel and testimony of two of its officers stated that the amount due Respondent for pre-petition sales was $72,187.00. Pet. App. B 10a-11a. Petitioner's counsel further stated that the funds to be paid to Respondent, other than for the pre-petition arrearage claim, would be the Respondent's trust funds. Pet. App. B 11a. Thus, fourteen days after the facsimile of January 30th, Petitioner still took the position that the funds being paid to Respondent were Respondent's trust funds.

On March 3, 1997, the Bankruptcy Court entered an Order reserving judgment on Petitioner's Motion to assume its contract with Respondent. Pet. App. B 11a. It is interesting to note that Petitioner now seeks to characterize this Order as denying its Motion to assume its contract with Respondent. Pet. 9. The Order of March 3, 1997 also allowed Petitioner to continue to operate as a retailer of Lottery tickets with Respondent. Pet. App. B 11a; Pet. App. C 26a. The Order of March 3, 1997 specifically set Respondent's total pre-petition claim at $72,187.00 without the necessity of Respondent filing a proof of claim and prohibited Petitioner from making payment of such claim. Pet. App. B 11a; Pet. App. C 26a. The Order of March 3, 1997 included additional provisions. Petitioner was authorized to continue to operate as a Georgia Lottery Retailer and was required to comply with its contract with Respondent, the rules and regulations of Respondent and

the Georgia Code. Pet. App. B 12a; Pet. App. C 26a. The Order also found that upon deposit into the Georgia Lottery Concentration Account, the monies received by Petitioner from the sale of Georgia Lottery tickets became the property of Respondent. Pet. App. B 12a. The transfers to Respondent on December 24, 1996, December 31, 1996 and January 7, 1997 came from Petitioner's Georgia Lottery Account. Pet. App. B 9a.

Respondent has not been paid anything toward its $72,187.00 pre-petition claim. Pet. App. B 12a.

On December 11, 1998, more than a year and a half after the Court entered the aforementioned orders and after Petitioner enjoyed the substantial benefits of continuing as a Lottery retailer until its stores were sold and it no longer needed the Lottery, Petitioner filed a complaint to recover alleged unauthorized post-petition transfers under 11 U.S.C. § 549 against Respondent.

Petitioner subsequently filed an amended complaint which sought, among other things, reconsideration of the Bankruptcy Court's Order of March 3, 1997. Petitioner realized that the March 3, 1997 Order, among others, authorized, or reaffirmed the validity of, the post petition transfers to Respondent and, therefore, had to be changed in order for it to prevail. The Order has never been changed in any way. Thus, the transfers were authorized.

In its Petition, Petitioner asserts several issues that it claims merit the grant of a writ in this case. First, Petitioner asserts that the Eleventh Circuit erred in affirming the District Court because Petitioner argues that the funds transferred to Respondent were property of the estate and no trust nexus existed between the funds transferred and the statutory trust in favor of Respondent.

Second, Petitioner asserts that the Eleventh Circuit erred in determining that the issues presented in this case are governed by, or analogous to this Court's decision in *Begier v. Internal Revenue Service*, 496 U.S. 53 (1990). Third, Petitioner asserts that the decision in this case undermines federal bankruptcy court jurisdiction. Fourth, Petitioner asserts that Respondent is simply an unsecured creditor of Petitioner's bankruptcy estate.

All of Petitioner's arguments are addressed herein. None provides a basis for this Court to grant a writ of certiorari. The funds voluntarily paid to Respondent were not property of the estate as they were held in trust for Respondent. In addition, the payments were authorized by orders of the Bankruptcy Court in the early stages of Petitioner's bankruptcy case. Thus, the Courts below all appropriately ruled in favor of Respondent.

PART II.

REASONS FOR DENYING THE WRIT

I. The Circuit Court Properly Affirmed the District Court's Affirmation of the Bankruptcy Court's Determination That the Transfers in this Case Did Not Involve Estate Property.

A writ should not be granted in this case. This case has been considered below by the Bankruptcy Court, the District Court and the Eleventh Circuit. All have ruled consistently for Respondent. The rulings are entirely consistent with this Court's precedent. In seeking a writ of certiorari, Petitioner greatly exaggerates the scope of the Ruling below.

Petitioner argues that the filing of the bankruptcy case destroyed any nexus which Petitioner characterizes as essential to the lower courts' determination that the funds in issue were not property of the estate. The funds in issue in this case are the trust funds of Respondent, were never the property of Petitioner, and were voluntarily paid to Respondent. The Courts below consistently determined that the transfers were voluntary. Pet. App. B 18a; Pet. App. C 35a-36a.

As the Bankruptcy Court concluded, there is no meaningful difference, for purposes of this case, between the avoidance powers under 11 U.S.C. § 547 and 11 U.S.C. § 549 when analyzing whether the funds in issue were property of the estate. Pet. App. C 29a-30a.

There is no question that there is a trust relationship in this case. O.C.G.A. § 50-27-21. Petitioner seeks to construe 28 U.S.C. § 959 to excuse it from complying with statutory trust requirements under Georgia law as well as the requirements of court orders and its contractual obligations. Respondent notes that Petitioner did not raise this argument before the Bankruptcy Court. Therefore, the argument would not appear to be properly before this Court. Notwithstanding this fact, the construction urged by Petitioner of 28 U.S.C. § 959 makes no sense. 28 U.S.C. § 959 required Petitioner to operate its business in compliance with Georgia law.

Petitioner's essential assertion is that because it allegedly did not have possession of the Respondent's trust funds on the day it filed bankruptcy, it was somehow exempt from complying with Georgia law in the handling of those funds to which Respondent was entitled. This argument is premised on factual findings that Petitioner

was not in possession of trust funds on the day it filed bankruptcy, or that the proceeds paid to the Respondent post-petition were from sales of tickets before the bankruptcy filing. No such findings have been made in this case. The clear facts in this case as determined by the Courts below are that the parties had a trust relationship and that Petitioner voluntarily paid funds over to Respondent.

Petitioner cites no case law to support its interpretation of 28 U.S.C. § 959 because its interpretation is exactly the opposite of the purpose of the statute. The filing of a Chapter 11 bankruptcy case does not excuse a debtor-in-possession from conducting its business in accordance with state law and complying with state law requirements. In fact, 28 U.S.C. § 959(b) explicitly requires that a debtor-in-possession "shall manage and operate the property in his possession as such Trustee, receiver, or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." Georgia statutory law governed the relationship between the Petitioner and Respondent. O.C.G.A. §§ 50-27-1 et seq.

The "proceeds" which Petitioner held in trust for Respondent also included unsold tickets and not just the cash proceeds of the tickets. O.C.G.A. § 50-27-21. Furthermore, under the contractual relationship between Respondent and Petitioner, the tickets and proceeds were "property" of Respondent in the possession of Petitioner. Such property had to be used in accordance with the requirements of Georgia law.

In an attempt to argue that it did not have possession of pre-petition funds that were the subject of the state

statutory trust, Petitioner continually states that it had no funds in its accounts on the day it filed bankruptcy. However, at the time it sought authority to use cash collateral in its bankruptcy case, Petitioner represented that it had over $330,000 on the day it filed bankruptcy. Even if Petitioner had no money in its bank account on the petition date and assuming it could use 28 U.S.C. § 959 to circumvent state law, it has proved nothing because it has no evidence to show that the funds from the sale of post-petition instant tickets were insufficient to fund the post-petition transfers to the Lottery. The Courts below recognized that activation of a pack of tickets pre-petition does not show that the tickets were sold pre-petition. Pet. App. B 9a; Pet. App. C 25a.

There is no question that the proceeds from ticket sales and the unsold tickets were held in trust by Petitioner for Respondent. O.C.G.A. § 50-27-21(a); *Georgia Lottery Corp. v. First Nat'l Bank of Grady County*, 253 Ga. App. 784, 787 (2002); *Georgia Lottery Corp. v. Daniel*, 225 B.R. 249, 251-52 (Bankr. N.D.Ga. 1998); *Georgia Lottery Corp. v. Thompson*, 296 B.R. 563, 566 (Bankr. M.D.Ga. 2003). Not only was the property held in trust, the parties' agreement, the orders of the Bankruptcy Court, and Georgia law provided that upon deposit into the account maintained for Respondent, the proceeds were deemed the property of Respondent. Pet. App. B 11a-12a. O.C.G.A. § 50-27-21(b); *Grady County*, 253 Ga. App. at 787.

With little citation of authority, Petitioner asserts that the fact that the funds were transferred after the filing of Petitioner's bankruptcy petition somehow changes the analysis. As correctly determined below, this distinction is of no consequence. Pet. App. C 29a-30a. The simple fact in this case is that even if the fact of the bankruptcy filing

created some distinction, Petitioner agreed, and was ordered, to comply with the terms of its agreement with Respondent as well as the requirements of Georgia law and the regulations of Respondent, both before and after the case. Pet. App. B 10a-12a; Pet. App. C 25a-26a. In order to obtain the benefits of being a retailer after the filing, Petitioner had to turn over to Respondent the funds that it held in trust for Respondent.

Petitioner cites Bankruptcy Rule 6001 in its Petition for the proposition that Respondent has the burden to prove the validity of a transfer under 11 U.S.C. § 549. This is not the case. While the language of Rule 6001 provides that the entity asserting the "validity of a transfer" has the burden of proof, *Collier on Bankruptcy* notes that "it would be . . . an unusual extension of normal principles of evidence if the Respondent were required to prove that a transfer did not happen." *Collier* states:

> A more appropriate reading of [Rule 6001] would place the burden of proof on the defendant only as to the last element, that the transfer was authorized under the Code or by the Court. This result is consistent with the language of the Rule providing that the entity asserting the "validity of a transfer" has the burden and reads into the Rule what is unsaid, but surely implied: the entity asserting the validity of transfer bears the burden of proof on the issue of validity of the transfer, and not necessarily on all other issues.

COLLIER ON BANKRUPTCY ¶ 6001.01[2]. Placing the burden of proof on the defendant as to whether a transfer occurred, whether it was property of the estate or whether it was made post-petition, would impermissibly shift the burden of proof from the moving party.

Petitioner had to show below that there was (1) a transfer (2) of property of the estate (3) made post-petition. *In re James B. Downing & Co.*, 74 B.R. 906, 908 (Bankr. N.D. Ill. 1987) (plaintiff bears the burden of proof on the issue of whether the transfer was property of the estate). Petitioner cannot meet this burden. Petitioner has no evidence when the Instant Tickets in its possession were sold. It simply cannot establish that the Instant Tickets it activated pre-petition were actually sold pre-petition. Pet. App. B 9a; Pet. App. C 25a. If the tickets were sold post-petition, not even Petitioner would argue that the cash proceeds were not trust funds of Respondent. Because Petitioner cannot produce evidence that the tickets were sold pre-petition, it cannot meet its burden of proof that the funds it voluntarily transferred to Respondent post-petition were property of the estate. Further, while not expressly stated in the conclusions of law below, Respondent notes that, even if the transfers in this case involved property of the estate, which they clearly do not, they would not be avoidable under 11 U.S.C. § 549 because they were authorized by the Bankruptcy Court. Pet. App. B 10a-12a; Pet. App. C 25a-26a.

II. The Eleventh Circuit Did Not Commit Error In Affirming the District Court's Determination that the Funds Paid to Respondent Were Held in Trust For Respondent As This Case is Controlled by *Begier v. Internal Revenue Service*, 496 U.S. 53 (1990).

A. The Decisions Below Properly Follow *Begier*

In deciding this case, the Bankruptcy Court and the District Court relied on this Court's decision in *Begier v. Internal Revenue Service*, 496 U.S. 53 (1990). In doing so,

the Bankruptcy Court determined that the funds voluntarily transferred by Petitioner to Respondent, including those funds deposited by the Petitioner into the Lottery Trust Account and swept by Respondent, were subject to a statutory trust. Pet. App. C 28a, 35a. The District Court agreed with the Bankruptcy Court's analysis and conclusions, including its reliance on *Begier*. Pet. App. B 15a. The Eleventh Circuit affirmed without opinion. Pet. App. A. There is no reason to grant certiorari in this case. The decisions of the three Courts below are entirely consistent with *Begier*.

There is no question that a statutory trust exists as recognized by the Courts below and every other court to have considered the relationship between Respondent and retailers of its tickets. *Grady County*, 253 Ga. App. at 787; *Daniel*, 225 B.R. at 251-52; *Thompson*, 296 B.R. at 566. There is also no question, as determined below, that the funds were voluntarily transferred to Respondent. Pet. App. B 18a; Pet. App. C 35a-36a.

In *Begier*, this Court conducted an in-depth analysis of an avoidance action wherein the payments sought to be recovered for the debtor's estate were made on account of a statutory trust obligation of the debtor for the benefit of the Internal Revenue Service ("IRS"). The trust funds included both withholding and excise taxes. In *Begier*, an airline fell behind in its pre-petition trust fund tax payments to the IRS and was ordered by the IRS to deposit all future taxes into a separate bank account. 496 U.S. at 56. The airline established the account, but failed to deposit all trust fund tax payments into that account: instead, the airline remained current on its obligations by paying the taxes both from the separate bank account and from commingled funds in its general operating accounts. *Id.* The airline filed for bankruptcy relief under Chapter 11,

the case was converted to Chapter 7 and the bankruptcy estate's trustee subsequently brought a preference action under 11 U.S.C. § 547 to recover the amount paid by debtor within the 90 days preceding the bankruptcy filing, including the tax payments made out of commingled funds in the airline's general operating accounts. *Id.* at 56-57.

This Court began its analysis by stating the general proposition that "if the debtor transfers property that would not have been available for distribution to his creditors in a bankruptcy proceeding, the policy behind the avoidance power is not implicated." *Id.* at 58. In conducting an examination of Section 547 of the Bankruptcy Code, this Court found that if the debtor does not own an equitable interest in property he holds in trust for another, that interest is not "property of the estate" as is defined in 11 U.S.C. § 541 and as applied in 11 U.S.C. § 547. *Id.* at 59 n.3.

Focusing on the language of the IRS Code creating a trust for the amount of taxes collected or withheld, this Court found that a trust arose when a person collected a tax for the IRS. *Id.* That trust applied to the amount of money collected rather than to an identifiable *res* as required under a common law trust. *Id.* at 62-64. Therefore, the trust arose when a person collected funds for the IRS regardless of whether the collector segregated the funds from its other assets. *Id.* at 60-61. As stated by this Court:

> The fact that [the debtor] neither put the taxes in a segregated fund nor paid them to the IRS does not somehow mean that [the debtor] never collected or withheld them in the first place. Mandating segregation as a prerequisite to the creation of a trust under § 7501 [of the IRS Code] would make § 7512's requirement that funds may be segregated in special and limited circumstances superfluous

> and would mean that [a debtor] could avoid the creation of a trust simply by refusing to segregate.

Id. at 54.

This Court then turned to the issue of whether the assets used by the debtor to pay the IRS were assets belonging to the trust. *Id.* Because the statutory trust was in the amount collected or withheld as opposed to a trust *res* under a common law trust, common law tracing rules were determined by this Court to be unhelpful in this analysis. *Id.* at 62-63. Relying on legislative history in the 1978 revision of Bankruptcy Code, this Court found that the IRS would have to show some nexus between the statutory trust and the assets to be applied to the debtor's trust fund obligation. *Id.* at 65-66. The House Report, on which this Court relied, stated, in pertinent part:

> A payment of withholding taxes constitutes a payment of money held in trust . . . if they have been properly held for payment, as they will have been if the debtor is able to make the payments.

Begier, 496 U.S. at 66, *quoting*, H.R. Rep. No. 95-595, p. 373 (1977), *U.S. Code Cong. & Admin. News*, 1978, p. 6329. This Court recognized that the "limitation that the funds must 'have been properly held for payment' is satisfied 'if the debtor is able to make the payments.'" *Id.*

This Court adopted a "literal reading" of the legislative history. The Court concluded that "[t]he debtor's act of voluntarily paying its trust fund tax obligation therefore is alone sufficient to establish the required nexus between the 'amount' held in trust and the funds paid." *Id.* at 66-67.

This Court also made it clear that the common law tracing rules did not apply to the case. This Court succinctly stated:

> In the absence of any suggestion in the Bankruptcy Code about what tracing rules to apply, we are relegated to the legislative history. The courts are directed to apply the reasonable assumptions to govern the tracing of funds.

Begier, 496 U.S. 53, 67. The House Report identified "one such assumption to be that any voluntary . . . payment of trust fund taxes out of the debtor's assets is not a transfer of the debtor's property." *Id.* Because the transfers to Respondent were voluntary payments of trust fund obligations, tracing rules are not applicable in this case, either.

Additionally, in *Begier*, this Court was explicit in its finding that a debtor who compromises the integrity of the trust by co-mingling funds in a general operating account in contravention of a statute directing otherwise will not be able to argue that those funds should be held to benefit the bankruptcy estate. *Id.* at 61.

Petitioner cannot successfully argue, as it continually attempts to do, that Lottery proceeds are subject to an avoidance action as property of the estate simply by advancing the argument that it commingled Lottery Ticket proceeds with funds in its general operating account. To do so is directly inconsistent with *Begier*, not to mention inconsistent with the Petitioner's contract with Respondent, the Bankruptcy Court orders and the requirements of Georgia law. Petitioner's own counsel acknowledged the existence and integrity of this trust before the Bankruptcy Court at the February 13, 1997 hearing when the Petitioner sought to assume its contracts with Respondent when he recognized

that the funds in the Lottery Trust account were the property of the Respondent. Pet. App. B 11a.

Petitioner argues that *Begier* does not apply to post-petition transfers. This Court's analysis in *Begier* is clear that its reasoning applies to post-petition transfers. 496 U.S. at 65. The Courts below recognized that the analysis is the same. Pet. App. B 17an.b; Pet. App. C 29a-30a.

The legislative history that formed the basis for the *Begier* decision included, *inter alia*, the following comment of Representative Edwards:

> The courts should permit the use of reasonable assumptions under which the Internal Revenue Service, and the tax authorities, can demonstrate that the amounts of withheld taxes are still in the possession of the debtor *at the commencement of the case*.

496 U.S. 53, 64 (1990), quoting 124 Cong. Rec. 32392, 32417 (emphasis added). This Court stated that the "context of Representative Edwards' comment makes it plain that he was discussing whether a *post-petition* payment of trust fund taxes involved "property of the estate." *Id.* at 65 (emphasis added). The comment necessarily concerned a post-petition payment of a pre-petition obligation, otherwise Representative Edwards would not have mentioned funds being held "at the commencement of the case." This Court also applied Representative Edwards' comments to a pre-petition transfer and specifically concluded that "the same reasonable assumptions therefore apply in both [pre- and post-petition] contexts." *Id.*

It is important to note, as this Court did in *Begier*, that the legislative history relating to a determination of whether trust funds were considered "property of the

estate" was spurred by this Court's 1971 decision in *United States v. Randall*, 401 U.S. 513 (1971). In *Randall*, this Court refused to enforce a statutory trust to authorize a voluntary post-petition transfer to discharge a trust fund tax obligation that the debtor had incurred pre-petition. The revisions to the Bankruptcy Code in 1978 were intended to overrule *Randall*. *Begier*, 496 U.S. at 63-65.

Accordingly, the District and the Bankruptcy Courts' reliance on *Begier* in reaching their conclusions in this case was well placed because *Begier* clearly recognizes that, for purposes of determining whether trust funds are property of the estate, the analysis is the same whether the transfer at issue was post-petition or pre-petition. *Begier*, 496 U.S. at 63-65.

Petitioner also argues that *Begier* is inapplicable because it deals with a specific federal tax statute. Again, as correctly noted by the Bankruptcy Court and the District Court, the issue in this case is whether the funds voluntarily transferred to the Lottery were "property of the estate." Pet. App. B 19a; Pet. App. C 29a-30a. As the Bankruptcy Court correctly noted, the fact that *Begier* dealt with a specific federal IRS statute is "inconsequential in this analysis." Pet. App. C 29a. The District Court noted that the IRS statute at issue in *Begier* is "remarkably similar" to the Lottery Act. Pet. App. B 16a.

Similarly, for example, when a person or entity collects an excise tax from a customer, that person or entity is in possession of the trust fund just like a Lottery Retailer is in possession of trust funds upon collecting the proceeds from the sale of a Lottery ticket. The Lottery Act expressly provides that upon the deposit of those funds in a bank account, the funds become property of the Lottery.

O.C.G.A. § 50-27-21(b). The breadth of the trust goes beyond the deposit into the separate trust account that may be required of a retailer, but extends to proceeds deposited into any bank account.

B. There Is A Reasonable Nexus Between The Funds Collected And The Funds Transferred.

Petitioner seeks to utilize *In re Wendy's Food Sys., Inc.*, 133 B.R. 917 (Bankr. S.D. Ohio 1991), in arguing that no "reasonable nexus" existed between the pre-petition trust and the funds swept post-petition because the balance in its bank account on the petition date was allegedly zero. As correctly noted by the Bankruptcy Court in this case, *Begier* held that "the conclusive presumption arises upon voluntary payment, regardless of the source of the payment and regardless of any intervening balance in the debtor's operating accounts." Pet. App. C 34a. In addition, Respondent disputes Petitioner's contention that it did not have any funds in its accounts on the petition date. Petitioner's own motion to use cash collateral in its bankruptcy case stated that it had about $330,000 in its accounts on the petition date.

The *Wendy's* decision incorrectly concluded that *Begier* found there are three elements, instead of two, that a taxing authority must satisfy in order to show that the trust funds were not property of the estate: (1) the debtor must collect or withhold the taxes, (2) the debtor must make a voluntary payment to the taxing authority and (3) that a reasonable nexus exists between the first and second elements. *Id.* It is this last requirement that *Wendy's* added to *Begier*. The Bankruptcy Court rejected the *Wendy's* decision. Pet. App. C 34a.

As seen above in *Begier* and as noted by the Bankruptcy and District Courts in their Orders, this Court found that a voluntary payment to the taxing authority *alone* is sufficient to establish the requisite nexus. Pet. App. B 18a; Pet. App. C 34a. Courts do not have to consider whether there was a nexus between the trust funds and the voluntary payment, such as whether the accounts from which the funds were paid contained sufficient funds at different points in time to meet the obligation. If that was a factor, this Court would not have found that the voluntary payment cannot be avoided *"regardless of the source of the funds,"* or that the voluntary payment *"alone"* was sufficient to establish the "required nexus." *Begier*, 496 U.S. at 66-67. (emphasis added). If something else was required, such as an analysis of the balances in the account at various points in time, then the voluntary payment would not "alone" be sufficient and the source of funds would have been relevant. Petitioner's reliance on *Wendy's* is misplaced in seeking to have this Court grant a writ of certiorari. Petitioner is essentially arguing that because a decision of the Eleventh Circuit did not follow an erroneous bankruptcy court decision in *Wendy's*, a writ of certiorari is appropriate. This argument is pointless.

Respondent notes that *Wendy's* has not been followed by other courts. In *In re Wellington Foods*, 165 B.R. 719 (Bankr. S.D.Ga. 1994), which is cited by the Bankruptcy Court in this case, the Bankruptcy Court for the Southern District of Georgia specifically stated " . . . I cannot agree with [the *Wendy's*] Court's analysis because it adds an element to the requirements of *Begier* which is not contained in the Supreme Court's opinion." 165 B.R. at 726. Therefore, the recipient of the trust funds is not required to show that the debtor made a voluntary payment of trust

funds *and* additional evidence showing that the reasonable nexus exists between the creation of the trust and the payment. *Id.* To the contrary, the fact that the voluntary payment occurred conclusively establishes the requisite nexus.

C. The Payments Are Conclusively Presumed to Be the Funds Held In Trust for Respondent.

Petitioner broadly asserts that the voluntary payments to Respondent from Petitioner's Georgia Lottery Trust Account are somehow presumed to be from the general assets of the estate. This is directly contrary to this Court's determination in *Begier* indicating that a voluntary payment alone creates the required nexus. 496 U.S. at 67.

In support of its broad assertion regarding a presumption that payments were from general assets, Petitioner cites *Bison Heating & Equipment, Inc. v. New York State Department of Taxation & Finance*, 177 B.R. 785 (W.D.N.Y. 1995). The *Bison* decision has nothing to do with this case. In *Bison*, the parties did not dispute that the bankruptcy trustee had a valid claim under 11 U.S.C. § 549. 177 B.R. at 787. Thus, *Bison* focuses not on the merits of a § 549 claim, but is largely directed to an analysis of sovereign immunity. 177 B.R. at 788-89. *Bison* is irrelevant to the determination of whether to grant a writ of certiorari in this case.

D. There Is No Requirement That a Trust *Res* Be Identified.

The funds paid to Respondent were held in trust by Petitioner for Respondent. Petitioner broadly argues that the payments in this case were made by a debtor-in-possession rather than the actual party to the agreement with Respondent. Petitioner also asserts that the funds

paid to Respondent were from post-bankruptcy funds, but on account of pre-bankruptcy sales.

There are several key facts that are relevant here. First, neither party has business records to show whether tickets activated pre-bankruptcy were actually sold pre-bankruptcy. Pet. App. B 9a; Pet. App. C 25a. Second, most of the funds paid over to Respondent were deposited into the Petitioner's Lottery Trust bank account. Pet. App. B 8a-9a; Pet. App. C 24a-25a. Such deposits were certainly the property of Respondent at the time that they were deposited. O.C.G.A. § 50-27-21. There is no question as to this issue. As a matter of contract, Bankruptcy Court order and Georgia law, the funds were clearly the property of the Respondent at the time of deposit. Pet. App. B 12a.

Petitioner argues that any post-petition transfers to the Georgia Lottery were not from Lottery ticket proceeds. Petitioner has no evidence to support this contention. The allegation used to support this argument appears to be that no designation was made by Petitioner that the amounts transferred to the Lottery were trust funds because deposits to the Petitioner's Lottery Account were made from the general, commingled post-petition account of the Petitioner. This argument is contrary to *Begier* for at least two reasons. First, *Begier* held that payment from a commingled account is irrelevant to the analysis. 496 U.S. at 60-61. Second, *Begier* held that the debtor basically designates the funds as trust funds by making the voluntary payment on account of the trust obligation. 496 U.S. at 66-67. There is a good reason for accepting the debtor's designation: who better than Petitioner, the party who collected the proceeds from the sale of the tickets, to contemporaneously designate what funds in its possession are trust funds by making voluntary transfers to the

Lottery. Now, six years later, after the officers and records are gone, Petitioner's lawyers are trying to argue that the funds their client voluntarily transferred to Respondent, including those deposited into the Lottery Trust Account, were not trust funds even though their client paid them on account of a trust fund obligation.

Petitioner made its decision, more than seven years ago, that these were trust funds both in its arguments to the Bankruptcy Court and its agreements with Respondent in 1996 and early 1997 and in practice by the making of voluntary transfers in the ordinary course of business pursuant to court orders, State law, and contract. Given that Petitioner acknowledges that it has no evidence that the funds transferred to the Lottery post-petition were not from post-petition ticket sales, it was ridiculous for it to ask a court more than six years later to disturb the ordinary and court approved business relations between the parties by re-characterizing the voluntary transfers to Respondent, including deposits into the Lottery Trust Account, to be something other than the Respondent's trust funds. All of the Courts below rejected Petitioner's arguments. It is likewise ridiculous for Petitioner to ask this Court to grant a writ of certiorari.

Petitioner's reliance on *In re Sunrise Paving, Inc.*, 204 B.R. 691, 692 (Bankr. D. Md. 1996), to establish the position that the Georgia Lottery must identify the trust *res* is misguided. In *Sunrise Paving*, the debtor wrote a check pre-petition to the IRS for the payment of FICA employment taxes. *Id.* at 693. The check, however, never cleared the bank. *Id.* When the IRS moved to recover the funds from the Debtor on the theory that the funds were held in trust for the IRS, the Bankruptcy Court, while acknowledging that a trust existed in favor of the IRS,

declined to order that the funds be transferred to the IRS because there was no voluntary payment since the check never cleared and there was a potential third-party secured claim against the funds in the account from which the check was issued. *Id.* In the instant case, Petitioner's transfers to Respondent were voluntary and Petitioner knew and acknowledged at that time that a trust for the benefit of the Respondent existed. Petitioner agreed with that conclusion. Its counsel agreed with it. The Bankruptcy Court acknowledged there was a trust relationship. It was, therefore, specifically understood by Petitioner and its lender, which asserted an interest in Petitioner's cash, that the lender had no claim to the funds transferred to Respondent. If the lender asserted a claim to these funds, it would have never consented to Petitioner's disbursement of $215,000.00 per week to the Lotteries of Georgia and Florida as part of the first authorization to use cash collateral. As such, there can be no doubt that a trust existed for the benefit of Respondent. *Sunrise Paving* is inapplicable to the instant case.

E. Respondent Does Not Have to Establish Tracing.

The "lowest intermediate balance" rule suggested by Petitioner is simply a mechanism used to determine the amount of funds held in trust when a court determines that tracing commingled funds is necessary. Under *Begier*, Respondent has no duty to trace funds commingled by Petitioner in contravention of state law. The transfers in *Begier* came from general, commingled accounts. 496 U.S. at 67. The funds were Respondent's property and were voluntarily transferred to Respondent.

III. The Decisions In This Case Do Not Undermine Federal Bankruptcy Court Jurisdiction.

Petitioner asserts that the decisions of the Courts below will have some great impact on the operation of bankruptcy courts and the administration of bankruptcy estates. Petitioner's assertions are overblown in that they greatly overstate the impact of the decisions below. The same concerns that Petitioner asserts will result from the inability to avoid the voluntary transfers in this case would also apply to the transfer that could not be avoided in *Begier*. *Begier* has been in place since 1990 without the resulting negative impact predicted by Petitioner. The simple fact is that the jurisdiction of bankruptcy courts to order the avoidance of transfers does not apply to property that is not property of the bankruptcy estate. With regard to the concern voiced by Petitioner, there is no meaningful difference between the avoidance powers under 11 U.S.C. § 547 and 11 U.S.C. § 549. Petitioner's argument that debtors-in-possession will pay over funds in order to avoid personal criminal sanctions arising from violation of "constructive trust" obligations would apply in pre-petition situations governed by 11 U.S.C. § 547 as well as post-petition situations governed by 11 U.S.C. § 549. Certainly, officers of debtors-in-possession could make decisions to pay trust obligations in order to avoid potential corporate as well as personal criminal or civil sanctions. If *Begier* and the decisions in this case lead to trust funds being voluntarily paid over to their rightful owners as occurred here, there is no harm, and likely a potential benefit, to the bankruptcy estate.

Further, speculation about potential impacts and consequences of a decision does not provide a reason for this Court to grant a writ of certiorari. The decisions below

are entirely consistent with this Court's precedent and do not conflict with precedent in any other Circuits.

IV. Respondent Is Not A General Unsecured Creditor of the Estate.

The only extent to which Respondent is a general unsecured creditor of Petitioner's bankruptcy estate is with respect to its pre-petition claim of $72,187.00. The funds paid over to Respondent were voluntarily paid. There is no dispute. The Courts below have consistently reached this conclusion. Pet. App. B 18a; Pet. App. C 35a-36a. The Petitioner held the funds in trust pursuant to O.C.G.A. § 50-27-21. The analysis of this case ends there.

Respondent also notes that the Petitioner and its estate benefited from the transfers. If Petitioner did not want to continue as a retailer post-petition, Petitioner could have simply ceased selling Georgia Lottery tickets when it filed its bankruptcy case and advised Respondent to pick up its property. That is not what Petitioner wanted. Petitioner never stopped selling tickets for even a moment. The primary focus of Petitioner's bankruptcy case was to find a buyer of its stores. Toward that end, Petitioner desperately wanted to assume the contracts with Respondent and, if assumption was not possible, Petitioner wanted to ensure that it could continue as a retailer of Lottery tickets during the case. Upon filing, Petitioner immediately sought to continue as a retailer for Respondent. Pet. App. B 10a-12a. There are a number of reasons the Petitioner sought to do so. First, Petitioner made direct income from selling Lottery tickets. After the filing of its bankruptcy, Petitioner sold in excess of $10,000,000 in Georgia Lottery tickets generating in excess of $600,000 in commission income to Petitioner.

Second, sales of Lottery tickets generated other sales for Petitioner. Customers came to Petitioner's locations to buy Lottery tickets and purchased other items while there. Third, the existence of an agreement with Respondent made Petitioner's stores more attractive to purchasers. Georgia Lottery equipment was already in place at the locations. Petitioner's personnel were familiar with Lottery equipment and selling tickets. Customers obviously associated availability of Lottery tickets with Petitioner's locations.

To obtain the benefits of being a retailer for Respondent, Petitioner agreed to comply with Respondent's rules and regulations, its contracts with Respondent, the Georgia Code and sought and obtained Bankruptcy Court orders authorizing it to do so. Only after Petitioner obtained those benefits and was able to sell its locations to a purchaser that instantly became a retailer of Georgia Lottery tickets did Petitioner suddenly decide it wanted to avoid the transfers. The simple fact is that Respondent entrusted Petitioner with tickets which Petitioner sold and collected the proceeds from such sales. Petitioner held the proceeds, like the tickets themselves, in trust, and voluntarily paid the proceeds over to Respondent. The proceeds thus paid over are clearly not property of the estate. Respondent is not an ordinary trade creditor that sold some form of goods to Petitioner. Respondent received its funds that Petitioner held in trust and that were in no way part of the estate. All of the Courts below agree with this result.

Respondent is not a general unsecured creditor to any extent beyond its claim of $72,187.00. The decisions below are entirely consistent with this Court's precedent and do not merit consideration by this Court.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Respondent prays that this Court decline to grant certiorari to review the decision of the Eleventh Circuit, as that decision is demonstrably in accord with this Court's decisions.

Respectfully submitted,

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